IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-5212, 5213

MICROSOFT CORPORATION,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA and STATE OF NEW YORK, *et al*.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPELLANT MICROSOFT CORPORATION'S MOTION FOR AN ORDER GOVERNING FURTHER PROCEEDINGS

Pursuant to this Court's Order of September 26, 2000, appellant Microsoft Corporation ("Microsoft") respectfully requests that the Court enter an order (1) allowing each side to file principal briefs of not more than 56,000 words and Microsoft to file a reply of not more than 28,000 words, (2) giving each side 60 days to file its principal briefs and Microsoft 30 days to file its reply brief, (3) permitting the parties to use the deferred appendix option, and (4) allowing 90 minutes or more per side for oral argument as the Court deems appropriate.

Microsoft believes that such an order will give the parties a fair opportunity to present their arguments on the many factual and legal issues presented by this appeal and permit the Court to consider those issues fully and expeditiously. Microsoft

has conferred with appellees about these four proposals, and appellees have stated that they agree only to the use of the deferred appendix option in this case.[1]

1. Format of Briefs. Parties normally are allotted 14,000 words for principal briefs and 7,000 words for reply briefs. FED. R. APP. P. 32(a)(7). Those word limits are insufficient for a case of this magnitude and complexity, in which Microsoft's very corporate survival is at issue.[2]

The scope of this case is monumental. The district court's decision is set out in three different published opinions that occupy 148 pages of the *Federal Supplement*. *United States* v. *Microsoft Corp.*, 97 F. Supp. 2d 59, 59-74 (D.D.C. 2000) (final judgment); *United States* v. *Microsoft Corp.*, 87 F. Supp. 2d 30, 30-57 (D.D.C. 2000) (conclusions of law); *United States* v. *Microsoft Corp.*, 84 F. Supp. 2d 9, 9-112 (D.D.C. 1999) (findings of fact). Moreover, appellees' and Microsoft's revised proposed findings of fact in the district court were 876 and 679 pages, respectively, and the parties' proposed conclusions of law—which did not address any of the issues relating to relief (as those issues were left for a later phase of the trial) or any of the issues relating to the district court's many extrajudicial discussions with the press later published by numerous news organizations—were 70 pages each. Finally, Microsoft's "summary response" to the relief ultimately entered by the district court and the company's memorandum in

[1] Given the voluminous record, Microsoft also requests that the parties be permitted to file additional copies of their briefs on CD-ROM with hyperlinks to all factual and legal authority cited in the briefs as a convenience to the Court. Appellees join in this request as well.

[2] Microsoft does not believe it necessary to extend the word limits applicable to briefs of *amici curiae*. *See* FED. R. APP. P. 29(d). Microsoft also suggests that *amici* for each side be required to file a joint brief absent a strong showing of cause for separate briefs, which, if allowed, should be no more than 7,000 words. *See* Circuit Rule 29(d) ("Amici curiae on the same side must join in a single brief to the extent practicable.").

support of its motion for summary rejection of plaintiffs' breakup proposal were 62 and 25 pages, respectively.

As explained in Microsoft's motion for a stay of the judgment pending appeal, filed in this Court on June 13, 2000, the district court's decision was infected by a multitude of serious substantive and procedural errors. In fact, in one of his many public comments about the case, the district judge candidly conceded at a September 28, 2000 antitrust conference in Washington, D.C., "Virtually everything I did may be vulnerable on appeal." Greg Store, *Microsoft Judge Blames Company "Intransigence" for Breakup*, BLOOMBERG, Sept. 29, 2000; *see also* James V. Grimaldi, *Microsoft Judge Says Ruling at Risk*, WASH. POST, Sept. 29, 2000, at E1.

The district court's many errors compel Microsoft to address a wide range of legal and factual issues on appeal. Microsoft also will have to devote considerable attention to the relief entered below, which is truly radical. Besides ordering that the company be broken in two, the district court imposed draconian "conduct" relief that extends far beyond the case that was tried and that implicates a large number of technologically complicated subjects. Included among that "conduct" relief is a requirement that Microsoft disclose the internal workings of its copyrighted operating systems to its direct competitors.

Appendix A hereto sets forth the principal legal issues Microsoft intends to raise on appeal, as stated at pages 21-23 of its Jurisdictional Statement filed with the Supreme Court in *Microsoft Corp.* v. *United States*, No. 00-139. In addition to those legal issues, Microsoft will challenge a number of the district court's factual findings as clearly erroneous. Although Microsoft will be as succinct as possible, the issues

presented by this appeal—all of which need to be resolved—require extended briefing. Microsoft thus requests that each side be granted 56,000 words for its principal brief and that Microsoft be granted 28,000 words for its reply brief.[3] Such expanded word limits are also appropriate in view of what this Court has recognized as "the exceptional importance of these cases." Order, dated June 13, 2000; *see also Microsoft Corp.* v. *United States*, No. 00-139 (U.S. Sept. 26, 2000) (Breyer, J., dissenting) (referring to need for "additional briefs" and "additional time for oral argument").

In large antitrust cases less complicated than this one, parties have frequently filed appellate briefs of comparable or greater length. For example, in *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), the defendant's brief was 211 pages, and the government's brief was 139 pages. Similarly, in *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948), the defendant's brief was 184 pages, and the government's brief was 290 pages. And in *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966), one defendant's brief was 189 pages, and the government's brief was 118 pages. More recently, in *Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), the Second Circuit permitted the parties to file principal briefs of 150 pages, a reply and answering brief of 65 pages and post-argument supplemental briefs of 30 pages. None of those cases involved issues as numerous and technically complex as those raised by the district court's rulings on liability and relief.

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[3] Because these appeals are consolidated, appellees (who assert nearly identical claims) should allocate their 56,000 words among themselves as they see fit. This Court's *Practice Handbook* provides that joint briefs are encouraged in consolidated cases pursuant to FRAP 28(i). D.C. Circuit Handbook of Practice and Internal Procedures 23 (1997). Microsoft has no objection to appellees' filing separate briefs so long as their combined length is no greater than that allowed for Microsoft's principal brief.

This Court also has recently permitted parties to file briefs well in excess of 14,000 words where, as here, the scope of the case warranted it. *E.g.*, *Michigan* v. *Envtl. Prot. Agency*, 1999 WL 229221, at *3 (D.C. Cir. Mar. 19, 1999) (permitting EPA to file principal brief not to exceed 38,500 words); *Transmission Access Policy Study Group* v. *Fed. Energy Regulatory Comm'n*, 1998 WL 633827, at *1 (D.C. Cir. Aug. 13, 1998) (permitting FERC to file principal brief not to exceed 62,500 words*); Am. Trucking Ass'n* v. *Envtl. Prot. Agency*, 1998 WL 65651, at *1 (D.C. Cir. Jan. 21, 1998) (permitting EPA to file principal brief not to exceed 41,250 words).

2. Briefing Schedule. Given the number of issues presented, the inherent complexity of the subject matters at issue and the size of the record, Microsoft requests that each side be given 60 days to prepare its principal brief and that Microsoft be given 30 days to prepare its reply brief. Entering such a briefing schedule will give the parties the time necessary to address the extensive record and to brief the many factual and legal issues raised by the district court's rulings on liability and relief.

3. Deferred Appendix. Because of the extensive trial record in this case, the parties should be permitted to use the deferred appendix option. *See* Circuit Rule 30(c). That approach will permit the parties to include in the appendix only those documents actually cited in their briefs, thus minimizing, to the extent possible, the size of the appendix and ensuring that it will not include a large number of exhibits that do not bear directly on the outcome of the appeals. Appellees agree that use of the deferred appendix option is appropriate in this case.

4. Oral Argument. Microsoft respectfully suggests that the Court allow 90 minutes or more per side for oral argument, as the Court deems appropriate after

review of the briefs. Microsoft also suggests that after reviewing the briefs, the Court consider (i) requesting short supplemental briefs (either pre- or post-argument) to address specific issues on which the Court would like additional argument, and (ii) advising the parties of specific issues on which the Court would like the parties to focus their oral argument.

* * *

Microsoft respectfully requests that the Court enter an order governing further proceedings as proposed herein. For the Court's convenience, a proposed form of order is attached hereto as Appendix B.

Respectfully submitted,

_____

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October 2, 2000

APPENDIX A

Whether the district court erred in holding that the relevant product market is limited to "PC operating systems," thereby excluding the principal competitive threats to Windows.

Whether the district court erred in holding that the need to persuade software developers to write applications for a platform constitutes a barrier to entry into the relevant product market.

Whether the district court erred in holding that Microsoft possesses monopoly power in a relevant product market.

Whether the district court erred in holding that Microsoft maintained a monopoly through anticompetitive conduct by seeking to maximize Internet Explorer's usage share at Navigator's expense.

Whether the district court erred in holding that plaintiffs need not establish a causal connection between the alleged anticompetitive conduct and Microsoft's supposed maintenance of a monopoly.

Whether the district court erred in holding that acts that are not themselves anticompetitive under controlling legal principles can become anticompetitive when viewed in combination with other acts.

Whether the district court erred in holding that Microsoft's development of new operating systems that include Web browsing functionality constituted an unlawful tie.

Whether the district court erred in holding that Internet Explorer is unlawfully tied to Windows when Navigator runs perfectly well on that operating system and tens of millions of people use Navigator with Windows.

Whether the district court erred in holding that agreements that did not violate Section 1 of the Sherman Act because they did not foreclose Netscape's access to consumers nevertheless violated Section 2.

Whether the district court erred in holding that provisions in Microsoft's license agreements with OEMs that, consistent with Microsoft's rights under federal copyright law, do not permit OEMs to modify Microsoft's copyrighted operating systems without Microsoft's permission violate Section 2 of the Sherman Act.

Whether the district court erred in holding that Microsoft possessed a specific intent to monopolize the alleged market for "Web browsers" when the district court found that Microsoft's intent was to prevent Netscape from achieving such a monopoly.

Whether the district court erred in holding that there is a dangerous probability that Microsoft will achieve monopoly power in the alleged market for "Web browsers" when the district court found that over one-third of Internet Explorer's usage share is controlled by AOL, which now owns Navigator.

Whether the district court erred in holding that Microsoft's June 1995 discussions with Netscape created a dangerous probability of monopolization of the alleged market for "Web browsers" when it is undisputed that Netscape rejected whatever proposal Microsoft supposedly made.

Whether the district court erred in dismissing Microsoft's counterclaims against the State attorneys general for seeking, under color of state law, to deprive Microsoft of its rights under federal copyright law.

Whether the district court erred in entering a sweeping permanent injunction without an evidentiary hearing on relief.

Whether the district court erred in imposing extreme and punitive relief unrelated to the antitrust violations found.

Whether the district court's extrajudicial communications with the press concerning the merits of these cases in violation of Canon 3A(6) of the Code of Conduct for United States Judges require that the judgment below be reversed and, if the cases are remanded, that they be assigned to another district judge.

Whether the district court erred in starting trial five months after the complaints were filed despite allowing plaintiffs to broaden their case dramatically.

Whether the district court erred in admitting large amounts of inadmissible hearsay over Microsoft's objection.

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-5212

United States of America,
Appellee,

v.

Microsoft Corporation,
Appellant,

_____
00-5213

State of New York, ex rel, et al,
Appellees,

v.

Microsoft Corporation,
Appellant.

BEFORE: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Randolph, Rogers, and Tatel, Circuit Judges

[PROPOSED] ORDER

Upon consideration of appellant's motion for an order governing further proceedings, appellees' response thereto, and reply, it is

ORDERED that appellant's brief not exceed 56,000 words and be filed within 60 days of this order. It is

FURTHER ORDERED that appellees' brief or briefs together not exceed 56,000 words and be filed within 60 days thereafter. It is

FURTHER ORDERED that appellant's reply brief not exceed 28,000 words and be filed within 30 days thereafter. It is

FURTHER ORDERED that the parties use the deferred appendix option described at FRAP 30(c). It is

FURTHER ORDERED that the appendix be filed 10 days after the reply brief is served. It is

FURTHER ORDERED that copies of the briefs containing references to the pages of the appendix be filed within 10 days after the appendix is filed. It is

FURTHER ORDERED that the parties may file additional copies of their briefs on CD-ROM. It is

FURTHER ORDERED that briefs of *amici curiae* be no longer than 7,000 words. It is

FURTHER ORDERED that *amici* on the same side are strongly encouraged to join in a single brief. Applications for separate briefs will be granted only upon a compelling showing of good cause.

The Court will issue separate orders concerning oral argument and, if warranted, supplemental briefs at the appropriate time.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Deputy Clerk, L.D.

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2000, I caused a true and correct copy of the foregoing Appellant Microsoft Corporation's Motion for an Order Governing Further Proceedings to be served by facsimile and by hand upon:

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